In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE JURAGUA IRON COMPANY, LIMITED, appellant, v. THE UNITED STATES. } No. 34.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The Juragua Iron Company, Limited, is a corporation organized under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business in the city of Philadelphia in that State. Appellant company is now and for many years has been engaged in the business of manufacturing iron and steel products and in mining and selling iron ore and other minerals in the United States, Cuba, and elsewhere. In its operations and in the furthering of its manufacturing and commercial interests it owned, leased, and operated mines in the island of Cuba and maintained offices, works, and the necessary tools, machinery, and equipments incident thereto in the province of Santiago de Cuba, Siboney, Firmeza, and La Cruz. In connection with

its said business appellant company owned real estate near the said city of Siboney, Cuba, including certain buildings of a permanent character situated thereon, which buildings were used in connection with its said operations and were also occupied as dwellings by its employees and for other purposes.

In the spring of 1898 the United States Government landed large bodies of troops in the island of Cuba for military operations in the prosecution of the war with Spain. At that time, and while the United States troops were engaged in active military operations in the province of Santiago de Cuba in the belligerent prosecution of the war, yellow fever was so prevalent and deadly in its effects that the lives of the American troops became endangered, and in order to preserve the health and lives of the American forces and to prevent the spread of the disease it became necessary to destroy all places of occupation or habitation which contained the fever germs.

On or about the 11th day of July, 1898, General Miles, commanding the United States forces in the island of Cuba, having been advised by his medical staff of the necessity for the destruction of all places harboring the fever germs, issued orders to his subordinate officers to destroy the buildings heretofore described, which were owned by appellant company. Pursuant to said orders the buildings and the contents thereof, consisting of furniture, tools, and other personal property, were destroyed by fire, the total value thereof at that time being $31,116.

Petition was filed in the Court of Claims by appellant company seeking to recover the foregoing amount from the United States, and on the issues joined the court entered judgment, ordering, judging, and decreeing that the petition be dismissed. Thereupon appeal was taken to this court.

THE ISSUES.

At the time this brief goes to print government counsel has not been served with a copy of appellant's brief.

It was contended in the court below that from the act complained of there arose an implied contract for payment on the part of the Government. That—

> Even if no contract could be implied from the action of General Miles, this court under the first section of the Tucker Act of March 3, 1887, would have power to assess and award the amount of the damages sustained by the claimant by the taking and destruction of its property, such appropriation not having been tortious. (Claimant's brief in court below, p. 66.)

It was further contended that General Orders, No. 101, A. G. O., to which reference is hereafter made, shows the intention and desire of the Government of the United States to make compensation for property seized and destroyed by the United States forces. This claim is made by reason of that portion of said orders which reads as follows:

> Private property taken for the use of the Army is to be paid for when possible in cash at

a fair valuation, and when payment in cash is not possible, receipts are to be given. (Claimant's brief, p. 69.)

It is the Government's contention that:

All property having its situs where international warfare is being waged is subject to seizure and destruction by the invading army when such action is necessary for the preservation, welfare, and safety of the force committing the destruction, regardless as to the domicile of the owner or his allegiance and loyalty to the country from which the invading party is sent forth.

Under the facts as found in this case, appellant company had its constructive or mercantile domicile in Spanish territory, and its property situate in such territory was impressed with enemy character, and as such was subject to seizure and destruction by the invading army under stress of military necessity.

Furthermore, eliminating the question of the right of the United States to seize or destroy the property in issue, the act complained of becomes simply a wrong committed on the part of the agents of the United States, and therefore the case is one sounding in tort, and appellant company can not recover.

That General Orders, No. 101, afford no basis whereby the claimant is entitled to recover, and that the orders did not change the rules of international warfare.

Furthermore, the President had not the power nor authority, without being specially authorized by

Congress, to create an obligation which is not recognized by law.

Military necessity may arise from many causes:

The liability of the property falling into the hands of the enemy and thus aiding the defense or impeding the progress of the invading forces.

The hindrance or obstacles that the property may present to the advancement of the invading army, either as to its character or its condition.

The harboring within the premises of enemies to the invading forces.

The existence of the germs of contagious, infectious, and deadly diseases within the property or its surroundings, endangering the lives of the invaders.

In fact, any condition attaching to the property that would impede, delay, or embarrass the invading army or endanger the lives and health of its soldiers in active warfare when prosecuting an international war, occasions a military necessity, and when such exists the right of destruction on the part of the invaders is recognized in the well-known rules of international law.

ARGUMENT.

The property destroyed was located in enemy territory and therefore subject to all the rules applicable to international warfare. These rules, practically forming a code of international law, have become fairly well defined and understood, and they are the result of the impress made by Christian civilization upon the nations of the world. Their

justness and fairness are recognized in contradistinction to that brutalizing warfare whereby the "Victor conquered but to slay, and slew but to triumph over the body of the vanquished." But in the evolution of the principles governing what we may term civilized warfare there have been preserved many of the ancient and old-time doctrines which are so firmly grounded, both from the necessity and reasonableness thereof, that to have excluded them would have been demoralizing in the extreme and against the universal sense of civilized nations.

Unlike the term "law," as used in modern civilized States wherein the statute is imposed and enforced by a superior power, "international law," or those principles which are supposed to govern independent States in international warfare, finds its cohesive force in the voluntary subjugation of such independent States to an enlightened conscience.

Among these well-grounded principles which have become engrafted into international law, and which receive the sanction and acquiescence of enlightened peoples, may be found the principles for which we contend in this case and on which we rely to support the judgment of the court below:

> The invader deals freely with the relations of the inhabitants of the occupied territory toward himself. He suspends the operation of the laws under which they owe obedience to their legitimate ruler, because obedience to the latter is not consistent with his own safety;

> for his security, also, he declares certain acts, not forbidden by the ordinary laws of the country, to be punishable. (Hall's International Law, 5th ed., p. 471–472.)
>
> It has been confessed that it is impossible to set bounds to the demands of military necessity; * * * there may be occasions in which the urgency of peril might excuse excesses such as those committed by Napoleon in Italy and Spain. (*Supra*, p. 474.)

The writer recognizes that under stress of military necessity invading forces may use or destroy both public and private property for purposes of prosecuting war, provided they do not commit wanton damage to public buildings, works of art, libraries, museums, etc. (*Supra*, p. 481).

The property of a foreigner situate within a state where military operations are being pressed becomes an element of strength to the state and may be treated as hostile by an enemy.

> A person though not a resident in a country may be so associated with it through having, or being a partner in, a house of trade there as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory. * * * If, however, the trade is in itself such as to create any special association, through the concession of exceptional privileges or otherwise, between the merchant and the belligerent state, the former becomes impressed with a hostile character relatively to enemies of the state, notwithstanding the fact of his absence. Thus

an American, possessing a tobacco monopoly in the Caracas, but not residing in Spanish territory, and conducting his trade through an agent, was held to have contracted a Spanish mercantile character. (*Supra*, pp. 500–501.)

Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the State to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which can not be moved into identification in respect of it with its national character. (*Supra*, 504.)

Devastation is capable of being regarded independently as one of the permitted kinds of violence used in order to bring an enemy to terms, or as incidental to certain military operations, and permissible only for the purpose of carrying them out. (*Supra*, 533.)

In summing up the author uses the following language:

Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender. (*Supra*, 535.)

A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character

> of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. "All such persons * * * are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory."
>
> * * * A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation. (See War Power under the Constitution by William Whiting, 2d ed., p. 342.)

In the discussion of the rights of property in hostile territory under the stress of military necessity, the author says:

> The destruction or capture of the property of loyal citizens by military forces invading the loyal States is not an appropriation of property by our Government. * * * But property of such citizens and of such foreigners may be destroyed by our military forces, under certain circumstances, without liability to pay for it. Thus, if one of our armies marches across a cornfield, and so destroys a growing crop, or fires a building which conceals or protects the enemy, or cuts down timber to open a passage for troops through a forest, the owner of such property, citizen or alien, has no legal claim to have his losses made up to him by the United States. Mis-

> fortunes like these must be borne wherever they fall. If any government is obligated to guarantee its subjects against losses by casualties of public war, such obligation must be founded upon some constitutional or statute law. Thus far no such obligations have been recognized in our system of congressional legislation. (*Supra*, 340–341.)

Again:

> The property of all the partners in a trading house in an enemy's country is lawful prize, though some of the partners have a neutral residence. The property of a person may acquire a hostile character, although his residence be neutral. * * * The commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods. If a citizen of the United States establishes his domicile in a foreign country, between which and the United States hostilities afterwards break out, property shipped by such citizen before a knowledge of the war, and captured by an American cruiser after the declaration of war, must be condemned as *lawful prize*. The property of a *house of trade established in an enemy's country* is condemnable as prize, whatever may be the *domicile* of the parties. (*Supra*, pp. 347–348.)

In a full discussion of the right of a belligerent to take or destroy private property under military necessity, the late General Halleck upholds the doctrine that where destruction is necessary in order to

cripple the operations of the enemy or to insure the success of the invading army, the same is permissible, and to this end provisions and forage may be destroyed in order to cut off the enemy's subsistence; fortresses, ramparts, and all structures devoted to the purposes of war may be razed to the ground, but holds that "such violent remedies are to be sparingly applied." (Halleck's International Law, vol. 2, pp. 75–77.)

The foregoing rules are cited and upheld in Taylor's International Public Law, pages 539–447.

So stands the law as furnished by text-book authorities applicable to the facts in the case at bar, and as stated by one author, "no change has taken place in the condition under which war is waged that can justify or excuse a change in practice."

DECISIONS OF THIS COURT SUSTAINING THE FOREGOING DOCTRINE.

We may eliminate everything that has been said by text-book writers in support of the propositions we have announced and turn to the highest authority for confirmation of the principles for which the Government contends in this case.

This court not only interprets and construes statutes, but it sometimes makes law, and its repeated announcements bearing upon the rules which we seek to sustain have become so well known that they establish and firmly fix that which may have been therefore somewhat unsettled and undetermined.

Mr. Justice Field, speaking for the court in the case of *The Cheshire*, said:

> No principle is more firmly settled than that the property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize without regard to the domicile of the partners. The trade of a house of this kind is essentially a hostile trade, and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile. Such trade tends directly to add to the resources and revenues of the enemy, and, as observed by Mr. Justice Story, "there is no reason why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce and at the same time possess all the advantages of a neutral character." (3 Wall., 233.)

In the case of *The Gray Jacket*, Mr. Justice Swayne, speaking for the court:

> The subject lies wholly beyond the sphere of his authority. The liability of the property is irrespective of the *status domicilli*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a

> citizen or subject of the hostile country or by the hostile government itself. (5 Wall., pp. 369–370.)

In the case of *The Friendschaft*, in which Mr. Justice Story delivered the opinion of the court, it was held:

> It has been long since decided in the courts of admiralty that the property of a house of trade, established in the enemy's country, is condemnable as prize, whatever may be the domicile of the parts. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company. (4 Wheat., p. 105.)

In the case of *Miller* v. *United States*, Mr. Justice Strong, in speaking of the power to prosecute war and respecting captures, says:

> It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to

> appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation. (11 Wall., pp. 305–306.)

In the case of *Lamar, executor,* v. *Brown et al.,* 92 U. S. R., 194, it was held:

> For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies.

In the case of *Dow* v. *Johnson,* this court said:

> The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of

> war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty. (100 U. S. R., 170.)

And Mr. Justice Harlan recognizes the principle in the case of *Hijo* v. *United States*, to which we shall hereafter call attention.

The so-called civil war, or war between the States, was conducted on the principles governing international warfare, and in the determination of the rights of individuals this fact has been recognized by this court in many decisions. We desire to call special attention to the case of *The United States* v. *Pacific Railroad Co.* (120 U. S. R., 228), in which Mr. Justice Field delivered the opinion of the court:

> It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parole, the recognition of flags of truce, and other arrangements designed to mitigate the rigors of warfare. The

inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. (*Brown* v. *Hiatts*, 15 Wall., 177, 184.)

The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequaled in the history of the present century. More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully or-

dered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex.*

These views are sustained in treaties of text writers, by the action of Congress, and by the language of judicial tribunals. (*Republica* v. *Sparhawk*, 1 Dall., 357; *Parham* v. *The Justices*, 9 Ga., 341; *Taylor* v. *Nashville & Chattanooga Railroad*, 6 Coldwell, 646; *Mayor* v. *Lord*, 18 Wend., 126.) (Pp. 233–234.)

Again:

The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than a strict legal right." (239.)

In addition to the foregoing authorities, see:

The Venice, 2 Wall., 258.
The Venus, 8 Cranch., 277.
Bagaley, 5 Wall., 408.
Young, 97 U. S. R., 60.
Lamar, Ex'r., 92 U. S. R., 194.
Hamilton v. *Dillon*, 21 Wall., 94.

In the enactment of the act of March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States" (12 Stat. L., 820), Congress emphasized its recognition of the fact that the war between the States was being conducted and should be prosecuted under the rules and regulations which had received the sanction and acquiescence of the great civilized nations in respect to international warfare. But Congress further recognized that in the application of these universal rules a number of citizens loyal to the Federal Government would necessarily suffer great hardship in the capture and destruction of their property; property which found its situs in those districts of the country in rebellion against the Federal Government, and which such citizens had no opportunity or power to remove.

In order to guard in so far as possible against the great losses which would be occasioned to such loyal citizens, the Congress in its wisdom provided for the collection of abandoned or captured property in any State or Territory, or any portion thereof, which had been designated as in insurrection, and made provision for the disposition of the same, and then provided in section 3 of the act, as follows:

> And any person claiming to have been the owner of any such abandoned or captured property may, *at any time within two years*

> *after the suppression of the rebellion*, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

The claimant to the proceeds of such property must conform to the standard set by furnishing sufficient proof to establish the facts:

1. As to his ownership of the property.
2. As to his right to the proceeds thereof.
3. That he had never given any aid or comfort to the present rebellion.

Claim for such proceeds, supported by competent testimony to establish the foregoing facts, must be made within two years after the suppression of the rebellion.

The foregoing act was supplemented somewhat and enlarged with respect to the agents taking charge of and leasing for a certain period abandoned land, houses, tenements, etc., within the districts named by the act of July 2, 1864 (13 Stat. L., 375).

Appellant seeks to recover upon the same footing as those persons who were especially favored by an act of Congress, notwithstanding it is not among the

excepted or favored class recognized by the passage of the abandoned and captured property act.

Congress has not seen proper to extend to appellant and other companies and persons of like situation the right to recover for property destroyed under the circumstances of the case at bar. It has not carved out appellant company as an exception to those who fall within the scope of international warfare, and until some provision is made conferring jurisdiction upon the courts whereby appellant and others similarly situated may have a legal right to recover, such persons and companies must seek a different forum than the Court of Claims or any other court. This claim has no foundation resting upon any principle or upon any of the laws enacted during or after the war of the rebellion under which the Government consented to liability in favor of owners of property seized or destroyed in disloyal territory.

In commenting upon the so-called abandoned and captured property act, Chief justice Waite said:

> The Government of the United States, in passing the abandoned and captured property act, availed itself of its just rights as a belligerent, and at the same time recognized to the fullest extent its duties under the enlightened principles of modern warfare. * * * While all residents within the Confederate territory were in law enemies, some were in fact friends. In the indiscriminate seizure of private property it seemed to Congress that friends might sometimes suffer. * * * As to all persons within the privileges of the act

the proceeds were held in trust, but as to all others the title of the United States as captor was absolute. Whoever could bring himself within the terms of the trust might sue the United States and recover, but no one else. * * *

If he (a nonresident alien) thrust himself inside the enemy's lines, and for the sake of gain acquires title to hostile property, he must take care that it is not lost to him by the fortune of war. While he may not have committed a crime for which he can be personally punished, his offending property may be treated by the adverse belligerent as enemy property. He has the legal right to carry, to sell, and to buy; but the conquering belligerent has a corresponding rank to capture and condemn. He enters into a race of diligence with his adversary and takes the chance of success. The rights of the two are in law equal. The one may hold if he can, and the other seize. (*Young* v. *U. S.*, 97 U. S. R., 60–63.)

It (property captured during the war) was not taken because of its ownership, but because of its character. But for the provisions of the abandoned and captured property act the title to and the proceeds of all captured property would have passed absolutely to the United States. By that act, however, the privilege of suing for the proceeds in the Treasury was granted to such owners as could show they had not given aid or comfort to the rebellion. This was a reward for loyalty, not a punishment for disloyalty. (*Supra*, p. 67.)

This special legislation enacted by the grace of Congress set aside for the time being in favor of loyal citizens the well-recognized rules of international warfare and those persons only who were within the scope of said legislation were affected by its terms.

TUCKER ACT.

We have thus far considered this case upon the assumption that the property destroyed was impressed with the nature and character of enemy property, and further that by its voluntary action in giving situs to its property within the island of Cuba, and from the nature of the business transacted there, appellant company acquired and maintained a commercial domicile in Spanish territory which rendered its property subject to the impress of enemy character. But the case of the *Pacific Railroad Company* v. *The United States*, heretofore cited, goes further, and in effect holds that even were this property considered the property of an American citizen and within the belligerent territory of the United States, the Government would not be responsible for its destruction when caused by necessary military operations. We need not, however, rest the defense to this action upon the well-settled principles heretofore announced. Any standing this appellant may have in the Court of Claims or in this court must find its basis and authority in the first section of what is commonly termed the "Tucker Act," being the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the Government of the

United States." (24 Stat. L., 505.) Said section provides as follows:

> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

The claim in this case we contend is not founded on the Constitution of the United States or of any act of Congress; neither does it find its basis in any regulation of an executive department, nor can it be said to be founded on a contract, either expressed or implied. Indeed, there is no element of contract in the case, for nothing was done by the United States nor anything said by any of its officers from which could be implied an agreement or obligation on the part of the Government to pay for the property destroyed.

Mr. Justice Harlan clearly differentiates between a case wherein may be found the elements of an implied contract and one similar to the case at bar. In the *Hijo case* a Spanish corporation brought suit in the Court of Claims to recover for the use of a certain merchant vessel taken by the United States in the port of Ponce, P. R., on July 28, 1898, during the Spanish war. The doctrine of implied contract is not disturbed, and the learned jurist gave sanction to the opinion formerly expressed by this court to the effect that the law will imply a promise to make compensation *where private property is taken for public uses, pursuant to an act of Congress*, but in distinguishing the cases, said:

> The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. * * * If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. (*Hijo* v. *U. S.*, 194 U. S. R., 323.)

In the case cited the claim appears to have much more merit and more closely approaches the requirements necessary in order to maintain a suit under the Tucker Act than in the case at bar. The vessel was seized by the United States and used by the Quartermaster's Department of the United States Army. The Government had the benefit of the use of the ship from July 28, 1898, until April, 1899. No such equitable feature can be found in the case at bar. This destruction of appellant's property occurred while war was flagrant; the lives of the United States forces were endangered by the prevalence of yellow fever; the spread of the disease was imminent; the buildings in question harbored the germs of the fever within their walls; the lives of the United States soldiers were in jeopardy, and the buildings, with their infectious germs, were situated in the midst of territory at a point where the United States Army was operating. The invading forces had more to fear from pestilence and disease than from Spanish bullets, and the United States authorities, recognizing the urgent military necessity therefor, resorted to the purifying power of fire to prevent great loss of life. These buildings were not taken for the use of the army, they were not used by the army, and their destruction arose only from the necessities heretofore stated.

Appellant's property was the instrument whereby great damage and irreparable injury would be done to the United States soldiers and officers. The officials

could not tear down or remove the buildings, for such action would but add to the danger of contracting disease. Whatever property of a personal nature was upon the premises could not be removed for the same reason. No recourse was left in order to prevent dire consequences to the invading forces other than the one adopted by General Miles.

This appellant company having established a commercial domicile in Spanish territory, such as has been shown by the facts in this case, certainly is not entitled to recover under the plea of implied contract for property destroyed under such circumstances as set forth in the record.

There is no provision in the act of March 3, 1887, whereby appellant can successfully maintain its action. The seizure and destruction may have made a case sounding in tort, but it is not one of contract, either expressed or implied.

GENERAL ORDERS, NO. 101.

In the court below, counsel for the appellant seemed to derive some comfort from General Orders, No. 101, and in their brief said:

> The order of General Miles directing the destruction of this property was given on July 11, 1898, and seven days later, on July 18, President McKinley issued the following order, which clearly shows the intention and desire of the Government of the United States to make just compensation for private property appropriated for the use of the army.

The orders to which reference was made are as follows:

> Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. * * * Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given. (General Orders, No. 101, A. G. O., series of 1898, Richardson's Messages of the Presidents, Vol. X.)

It must be remembered that these orders were issued at a time when it was expected that the United States forces would be necessitated to take for their subsistence and use certain property in conquered territory, but in the destruction of the buildings in question they were not taken for the use of the army, either for hospitals or as shelter for the troops. They were destroyed not for the use of the American forces, but for their protection. Therefore, General Orders, No. 101, afford no basis whereby the claimant is entitled to recover on the theory of implied contract. The orders did not and could not change the universally adopted international rules of civilized warfare.

The President had not the power nor the authority, without being specially authorized by Congress, to

create an obligation which is not recognized by the well-known principles of law; and nothing less than an act of Congress can be relied upon to change the rule as heretofore stated and impose an obligation for the payment of property destroyed under like circumstances. No protection is afforded by orders of the President except in so far as such orders are warranted by law.

In the case of *Little et al.* v. *Barreme et al.* (2 Cranch.) Chief Justice Marshall said:

> I confess, the first bias of my mind was very strong in favor of the opinions, that though the instructions of the Executive could not give a right, they might yet excuse from damages. * * * I was strongly inclined to think that where in consequence of orders from the legitimate authority a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions can not change the nature of the transaction, nor legalize an act which without those instructions would have been plain trespass. (*Supra*, side p. 179.)

CONCLUSION.

For a further discussion and citation of authorities we respectfully refer the court to the clear and concise opinion delivered by Judge Barney of the court

below. (Rec., pp. 6 to 8, inclusive.) This appellant gave a permanent situs to its property in Spanish territory. It paid taxes and presumably conformed to the laws and requirements of the state where the property was situated. In this sense it was a supporter of the Spanish Government and its property was liable to such extraordinary subsidies as the prosecution of a war might demand. We do not think that the trial court committed error in dismissing the petition, and therefore ask that the judgment of the court below be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE JURAGUA IRON COMPANY, LIMITED, Appellant, *v.* THE UNITED STATES. } No. 34.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Claimants' counsel contend for the right of recovery under the treaty of 1795 between the United States and the Kingdom of Spain. Article 13 of said treaty provides:

> For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the two nations one year shall be allowed to the merchants of the cities and towns where they shall live for collecting and transporting their goods and merchandises; and if anything be taken from them or any injury be done them within that term by either party or the people or subjects of either, full satisfaction shall be made for the same by the Government.

It was the law of nations and the rules of war that upon the breaking out of a war between two nations each had the right to seize and confiscate the

private property of any of the subjects found within the territory limits of such nation. The article quoted was not intended to protect any and every kind of property owned by subjects of the one nation within the territory limits of the other. The article does not apply to real estate, buildings, fixed machinery, or other property than that of merchandise or goods which might be moved immediately. The buildings destroyed were not covered by article 13 of this treaty.

But it will be seen upon examination of the public records that the treaty was not in force at the time this property was destroyed. Ambassador Hay cabled to the Secretary of State from London on May 7, 1898, the following:

> The Spanish Government have informed British embassador, Madrid, that the whole of the treaty of 1795 is abrogated, but if the Government of the United States will propose through British embassy an agreement embodying conditions of article 13, Spanish Government will accept. Agreement must be limited to merchandise. (Foreign Relations, 1898, p. 972.)

The State Department replied on May 8, 1898, by telegram from Secretary Day to Ambassador Hay, as follows:

> The department does not consider treaty provisions expressly applicable to war between contracting parties as abrogated by war and therefore can not propose or make

new agreement embodying the conditions of article 13, treaty 1795; so inform the British embassy, Madrid.

Subsequent correspondence quoted in Foreign Relations (p. 971 and succeeding pages) shows that the Spanish Government would not accede to the proposition that the whole of the treaty of 1795 was not abrogated and it appears affirmatively that no further action toward making a new agreement was taken. The Government of Spain remained consistent in its refusal to agree that any part of the treaty of 1795 remain in force during the war. (Negotiations for the treaty of Paris, Senate Document 62, Part II, 55th Congress, third sess., pp. 254, 255.)

The history of the progress of the Spanish war will show that the United States by its own acts acquiesced in the act of Spain in abrogating the whole of its treaty upon the declaration of war. The President's proclamation declaring war against Spain was issued April 22, 1898. The Spanish decree stating, among other things, that the treaty was terminated was issued April 23, 1898. On April 26, 1898, the President issued a proclamation in which he declared that Spanish merchant vessels in ports of the United States should be allowed until May 21, 1898, to load and depart. (Foreign Relations, 1898, p. 772.) This, it will be noted, if not an express abrogation of article 13, is at least utterly inconsistent with that

article which allowed Spaniards a year in which to remove personal property. The Government of Spain by her decree of April 23, 1898, allowed ships belonging to the United States five days within which to depart from Spanish ports. The instructions of June 20, 1898, issued to the United States blockading vessels were wholly inconsistent with this article of the treaty of 1795.

This court decided in the case of *Buena Ventura* (175 U. S., 384) that but for the proclamation of April 26, 1898, allowing Spanish vessels until May 21 to clear and depart the ship would have been liable to seizure and condemnation as enemy's property. This could not possibly have been true if there was any question that article 13 of the treaty of 1795 had not been abrogated. The same question arose in the case of the *Panama* (176 U. S., 535), and again this court decided that the vessel would be liable to capture unless protected by the President's proclamation.

It is clear, in any event, that in this article the United States has not created any obligation to its own citizens. The whole purpose of the treaty is to fix a responsibility on each nation for the protection of the property of the citizens of the other nation.

Finally, the Court of Claims has no jurisdiction of a claim "growing out of or dependent on any treaty stipulation entered into with foreign nations." (R. S., sec. 1066.) There is no such condi-

tion in the case at bar as would bring the claim within the rule announced in the case of *United States* v. *Weld* (127 U. S., 51), where the jurisdiction was held to depend on the statute and not on the treaty. The action of the President in approving General Orders, No. 101, is not such executive action as to create an obligation and is not enough to avoid section 1066, R. S., as construed by this court. The claim in this view of the case is clearly one growing out of and depending on the treaty, and there is nothing from which a contract can be implied. (*Great Western Ins. Co.* v. *United States,* 112 U. S., 193; *Alling* v. *United States,* 114 U. S., 562; *Langford* v. *United States,* 101 U. S., 341.)

In the Langford case, this court, quoting from the Gibbons case (7 Wall., 269), says:

> It is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officers, those acts being in themselves torts. * * * The language of the statutes, which confer jurisdiction upon the Court of Claims, excludes, by the strongest implication, demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while en-

> gaged in the discharge of official duties. * * * These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the General Government, though they have been committed while serving the Government and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination.

In view of the foregoing, we contend that appellant has no standing in the courts whereby it may recover under article 13 of the treaty of 1795.

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Assistant Attorney-General.

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